

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES R. ROWE,	)	
	)	
Petitioner,	)	CASE NO. C05-1219-MJP-MJB
	)	(CR98-315-MJP)
v.	)	
	)	REPORT AND
UNITED STATES OF AMERICA,	)	RECOMMENDATION
	)	
Respondent.	)	
_____	)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a federal prisoner who is currently confined at the FCI Bennetsville, in Bennetsville, South Carolina. Petitioner has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal sentence. The government has filed a response, raising the statute of limitations as a bar to the Court's consideration of petitioner's motion. Because the government is correct in its arguments, petitioner's motion should be dismissed as untimely.

PROCEDURAL HISTORY

On December 19, 2001, Petitioner pleaded guilty, pursuant to two separate plea agreements, to charges of being a felon in possession of a firearm, false impersonation of

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1 a federal agent, false statement in obtaining a firearm, and three counts each of bank  
2 fraud, wire fraud, and interstate transportation of property stolen or obtained by fraud.  
3 See CR98-315-MJP, Dkt. #15 and CR01-275-MJP, Dkt. #18. He was sentenced to a  
4 total term of 150 months imprisonment to run consecutively to other undischarged terms  
5 of imprisonment, including two cases out of San Diego Superior Court. CR98-315-MJP,  
6 Dkt. #28 at 3. Petitioner did not file an appeal in either case. On July 11, 2005,  
7 petitioner filed the instant motion for relief under § 2255. Dkt. #1. The government  
8 filed a timely response (Dkt. #13); petitioner has not filed a reply.

### 9 DISCUSSION

10 Petitioner raises the following grounds for relief in his § 2255 motion: (a)  
11 ineffective assistance of counsel; (b) his plea was not voluntary and was not made with  
12 understanding of the full consequences of his plea; (c) the sentencing court added  
13 enhancements to his base offense level that were not proven by a jury, in violation of the  
14 Sixth Amendment under *Blakely v. Washington*, 124 S.Ct. 2531 (2004)<sup>1</sup> and *United*  
15 *States v. Booker*, 125 S.Ct. 738 (2005); (d) he was not accorded the right of allocution;  
16 and (e) the schedule of restitution payments has been improperly delegated to the Bureau  
17 of Prison (“B.O.P.”). In response, the government argues that petitioner’s motion is  
18 untimely and therefore barred from review.

19 Motions filed pursuant to 28 U.S.C. § 2255 are governed by the one-year statute  
20 of limitations provided in the Antiterrorism and Effective Death Penalty Act of 1996  
21 (“AEDPA”). This one-year statute of limitations begins to run from the latest of –

22 (1) the date on which the judgment of conviction became final;

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23  
24 <sup>1</sup>Although petitioner cites *Blakely*, that case applies only to the Washington state  
25 sentencing scheme, not the federal sentencing guidelines under which petitioner was sentenced.

1 (2) the date on which the impediment to making a motion created by  
2 governmental action in violation of the Constitution or laws of the United  
3 States is removed, if the movant was prevented from making a motion by  
4 such governmental action;

5 (3) the date on which the right asserted was initially recognized by the  
6 Supreme Court, if that right has been newly recognized by the Supreme  
7 Court and made retroactively applicable to cases on collateral review; or  
8 (4) the date on which the facts support the claim or claims presented  
9 could have been discovered through the exercise of due diligence.

10 28 U.S.C. § 2255.

11 Petitioner does not dispute that he filed the instant § 2255 motion more than one  
12 year after his conviction became final. Rather, in arguing that the *Booker* decision  
13 should be applied retroactively, he relies upon subsection (3), as set forth above, which  
14 is effectively an exception to the general one-year limit set forth in subsection (1). This  
15 exception essentially has two conditions that must be satisfied before it applies. First,  
16 petitioner must show that he filed the § 2255 motion within one year from the date that  
17 the Supreme Court announced any “newly recognized” rights that are the basis of the  
18 motion. Second, petitioner must show that the Supreme Court made these rights  
19 “retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(3).

20 It is undisputed that petitioner filed his § 2255 motion in July, 2005, which is less  
21 than one year from when the Supreme Court decided *Booker* in January, 2005.  
22 However, the Supreme Court has been silent as to whether *Booker* applies retroactively.  
23 The Ninth Circuit – and all other circuits that have considered the question – has held  
24 that *Booker* does not apply retroactively to cases on collateral review where the  
25 conviction was final as of the date of *Booker’s* publication. *See Schardt v. Payne*, 414  
26 F.3d 1025, 1027 (9th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir.  
2005). Thus, petitioner fails to satisfy the second prong of the exception and his § 2255  
motion is therefore untimely.

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CONCLUSION

For the foregoing reasons, petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence is barred by the applicable statute of limitations and should be dismissed. A proposed order is attached to this Report and Recommendation.

DATED this 14<sup>th</sup> day of August, 2006.



MONICA J. BENTON  
United States Magistrate Judge